litigationupdate

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The rising risks of the e-document evolution

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With electronic files now dominating workplace documentation and communication, significant litigation risks have emerged relating to the production of e-documents when a dispute arises. The good news? A proper document management plan can reduce these potential risks substantially.

If you've been involved in the litigation process, you're likely familiar with the term "discovery". It's the pre-trial process in which each side produces documents that are relevant to the dispute and then is examined under oath on them. The strengths and weaknesses of a case are often revealed in the discovery process and while the process can be lengthy, it can also be a catalyst for resolving a dispute.

Or at least, it traditionally has. What used to be discovery has evolved into "e-discovery", and it's brought a significant change to how many litigation cases are handled.

Here's why. Twenty years ago, discovery involved the review of paper documents. While many documents were created electronically, they were ultimately exchanged in hard copy, as email didn't exist as a delivery method. The lack of email also meant there were typically far fewer documents to discover. The result was a contained discovery process that had boundaries and a set of conventions that everyone understood.

Fast forward to today. Documents are not only created and delivered electronically, but meta-tags – the electronic information that reveals where and how a document has been opened and altered – are in themselves discoverable documents. And with email now the principal means of business communication, the potential discovery trail of documentation has increased exponentially.

Business risks explained

Businesses that don't have a plan in place to manage their electronic documentation face a number of potential risks in the event a dispute arises. These risks have already materialized in a number of cases in the United States, where the e-discovery case law is more highly developed. Three risks in particular are worth noting:

- **Adverse inferences.** Improper handling or production of e-documents has resulted in courts drawing an adverse inference against the litigant with an assumption that such documents would have harmed their case.
- **Prohibitions on witnesses.** Courts have prohibited litigants from calling certain witnesses as a result of the late, or non-disclosure of e-documents.
- **Costs Sanctions.** Courts have imposed prohibitive costs sanctions against litigants to reflect their disapproval of e-document disclosure practices.

In addition, there is another enormous risk faced by litigants – that the expense of the e-discovery process could itself determine the outcome of a lawsuit, with a result decided less on the merits and more on procedural issues.

A document management plan – put in place before the threat of litigation materializes – is a key proactive step in reducing these potential risks. While such a plan will vary by organization and be tailored to its procedures and needs, a plan will typically outline:

- how electronic files should be accessed and stored
- when and how files should be destroyed
- how documents should be managed in the event of pending litigation.

Canadian case law developing

In Canada, the recent *Air Canada v. WestJet* lawsuit (in which WeirFoulds was one of the law firms acting for WestJet) highlighted another aspect of e-discovery – the attempt by one party to shift the expense of e-discovery to the opposing party.

Here is what happened. In April 2004, Air Canada sued WestJet, alleging that the defendant had accessed confidential data from an internal website. After producing some documents for discovery, Air Canada estimated it still had 75,000 more to go and wanted to produce them without fully reviewing them, putting the onus on WestJet to determine whether they were relevant to the litigation or privileged communications that could not be used in the lawsuit.

The issue was one of time and cost, with Air Canada arguing that the process was laborious and that it should not have to incur this expense.

The court disagreed and ordered Air Canada to undertake a proper review of the documents as part of the discovery process. We do not know if the review ever took place as the lawsuit was settled soon after the court made its order.

Move to a consistent e-discovery process

One move to lower the potential costs of e-discovery and make the process consistent from case to case is the adoption of rules that specifically address the e-discovery process. The United States has recently enacted such rules for its Federal Courts, with one of the key ones requiring lawyers on both sides of a dispute to address all e-discovery issues at the beginning of the litigation process. This provides certainty from the beginning as to how the discovery process will take place.

In this country, several provinces, including Ontario, have developed or are working on guidelines for e-discovery. Also, Sedona Canada, a working group of the U.S. think tank The Sedona Conference, published a draft set of principles in February 2007 that address electronic document production as part of the Canadian litigation process. Similar principles were published in the U.S. in 2003, with many of the recommendations now part of the new U.S. rules discussed above.

With a more consistent e-discovery process slowly evolving in Canada, this is an excellent opportunity for businesses to reexamine their e-document management procedures. By adopting best e-document management practices now, businesses can significantly lower their business risks relating to any future litigation.

Questions?

If you have questions about e-discovery, we can help. Please feel free to call us if you have any questions.

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